Supreme Court, U.S.
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No. 86-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS H. PEREGOFF,
Petitioner

v.

THE CHESAPEAKE & POTOMAC
TELEPHONE COMPANY OF MARYLAND,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER A DISCRETIONARY REFUSAL BY THE HIGHEST APPELLATE COURT OF MARYLAND, TO REVIEW A DECISION OF MARYLAND'S INTERMEDIATE APPELLATE COURT, SHOULD BE REVIEWED BY THIS COURT ON CERTIORARI.

2. WHETHER A DECISION OF A STATE COURT, RESTING EXCLUSIVELY ON ADEQUATE AND INDEPENDENT STATE JURISDICTIONAL AND PROCEDURAL GROUNDS, SHOULD BE REVIEWED ON CERTIORARI.

LIST OF PARTIES

LOUIS H. PEREGOFF, *Petitioner*

The Chesapeake and Potomac Telephone Company of Maryland, *Respondent.* Respondent is a subsidiary of Bell Atlantic Corporation. Respondent has the following affiliates which have outstanding securities in the hands of the public: Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, New Jersey Bell Telephone Company, Bell Atlantic Systems Leasing International, Inc., and Bell Atlantic Tricon Leasing Corporation.

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Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 60, September Term, 1986 (Md. Ct. Spec. App., Sept. 17, 1986).

Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 85130045/L34450 (Cir. Ct. Balto. Cty., Dec. 16, 1985) (on reconsideration).

Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 85130045/L34450 (Cir. Ct. Balto. Cty., Sept. 30, 1985).

JURISDICTION

Jurisdiction invoked by Petitioner pursuant to 28 U.S.C. § 1257(3) does not lie in this Court, as more fully explained below under Reasons for Denying the Writ.

STATUTES INVOLVED

28 U.S.C. § 1257(3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Md. Cts. & Jud. Proc. Code Ann., § 1-301 (1984 Repl. Vol.)

> The Court of Appeals of Maryland, established by Article IV, §§ 1 and 14 of the Constitution, is the highest court of the State.

Md. Cts. & Jud. Proc. Code Ann., § 1-401 (1984 Repl. Vol.)

> The Court of Special Appeals is established. It is an intermediate court of appeal authorized by Article IV, §§ 1 and 14A of the Constitution.

Md. Cts. & Jud. Proc. Code Ann., § 12-201 (1984 Repl. Vol.)

> Except as provided in § 12-202 of this title, in any case or proceeding pending in or decided by the Court of Special Appeals upon appeal from a circuit court or an orphans' court or the Maryland Tax Court, any party, including the State, may file in the Court of Appeals a petition for certiorari to review the case or proceeding. The petition may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than the time prescribed by Maryland Rules. In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion.

Md. Cts. & Jud. Proc. Code Ann., § 12-203 (1984 Repl. Vol.)

> If the Court of Appeals finds that the review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Chesapeake and Potomac Telephone Company of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Order of the Court of Appeals of Maryland denying a writ of certiorari. That Order is found at Appendix A of the Petition.

STATEMENT OF THE CASE

The Petitioner, Louis Peregoff, filed a five count Complaint in the Circuit Court for Baltimore City on May 10, 1985, on behalf of himself and all others similarly situated, against Respondent, The Chesapeake and Potomac Telephone Company of Maryland (hereafter "C&P"). Petitioner charged that a number of C&P practices were illegal, particularly the

implementation of its Inside Wire Maintenance Plan (hereafter "Plan").[1] The Plan had been approved in Orders of the Public Service Commission of Maryland (hereafter "PSC"), dated December 29, 1983 and January 6, 1984. Those Orders also allowed C&P to separate the cost of maintaining telephone wire inside customers' premises from the charge for basic telephone service. In essence, the Plan would *continue* C&P's maintenance of inside wire for a fifty-cent per month fee, per telephone line, if the customer desired. Otherwise, the customer could terminate the maintenance service and make his or her own repairs, hire an independent repair service, or hire C&P on a time and materials basis. Basically, Petitioner's complaint was that C&P continued to charge customers who did not ask it to *discontinue* the service despite a PSC-ordered notification campaign which contemplated and required this procedure.

On June 13, 1985, C&P filed a Motion to Dismiss for failure to exhaust administrative remedies before the PSC and for failure to state a claim upon which relief can be granted.[2] The Circuit Court granted C&P's Motion to Dismiss, treating it as a Motion for Summary Judgment. That decision was affirmed on September 17, 1986 by the Court of Special Appeals of Maryland in a *Per Curiam* Opinion. The Court of Appeals of Maryland denied a Petition for Writ of Certiorari on January 2, 1987.

The Petition to this Court was filed on or about May 1, 1987, which was within the 45 day extension of time granted for filing it. In essence, the Petition argues that a writ of certiorari should issue for two reasons. First, the Court of Appeals should

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[1] In addition to his claims related to the Plan, Petitioner charged: that he was improperly required to post a security deposit for telephone service; that C&P improperly discontinued offering certain services; that, despite non-payment, his telephone service was improperly terminated; and that C&P improperly bills monthly in advance for service.

[2] That portion of the Motion seeking dismissal for failure to state a claim upon which relief can be granted was directed toward an allegation that C&P committed a trespass *quare clausum fregit* by terminating Petitioner's telephone service. As the Court of Special Appeals noted in its Opinion at 7 (A-11 and A-12), Petitioner conceded there was no physical intrusion, an essential element of that tort under Maryland law.

have granted a Petition for Writ of Certiorari even though the Court of Special Appeals had decided that the trial court's decision was in conformity with governing Maryland precedent. Second, it argues, at Pages 6, 11-12, 17-18, 24, 29 and 36-38, that the courts below erred in not holding that all of the issues involved should properly be decided by the Courts in the first instance even though, under unchallenged Maryland law, Petitioner's various complaints must initially be presented to the PSC.

REASONS FOR DENYING THE WRIT

1. THE COURT SHOULD DENY THE PETITION TO REVIEW THE COURT OF APPEALS' DISCRETIONARY DECISION NOT TO REVIEW THE COURT OF SPECIAL APPEALS' MANDATE.

All three questions presented by Petitioner ask the Court to decide whether the Court of Appeals of Maryland, Maryland's highest court, Md. Cts. & Jud. Proc. Code Ann., § 1-301 (1984 Repl. Vol.), erred or abused its discretion in denying a writ of certiorari to review a decision by the Court of Special Appeals, Maryland's intermediate appellate court, Md. Cts. & Jud. Proc. Code Ann., § 1-401 (1984 Repl. Vol.). The Court of Special Appeals had previously affirmed the Order of the Circuit Court for Baltimore City entering judgment in favor of respondent. It is clear that the Court of Appeals' Order denying a writ of certiorari, pursuant to its statutory discretion, Md. Cts. & Jud. Proc. Code Ann., §§ 12-201 and 12-203 (1984 Repl. Vol.), is not a final judgment reviewable pursuant to 28 U.S.C. § 1257(3).

Review by this Court of judgments of state courts is governed by 28 U.S.C. § 1257, which provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

It is well established that the Maryland Court of Appeals' decision denying a writ of certiorari is not an appealable final judgment within the meaning of this statute. Instead, if the highest court of a State declines to exercise its authority to review the judgment of an intermediate appellate court, the intermediate court's judgment, not the order declining review, is the reviewable final judgment "rendered by the highest court of a State in which a decision could be had. . . ." *Sullivan v. Texas,* 207 U.S. 416 (1908); *American Ry. Exp. Co. v. Levee,* 263 U.S. 19, 20-21 (1923); *Hammerstein v. Superior Court,* 341 U.S. 491, 492 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 678 n. 1 (1968).

In *Michigan-Wisconsin Pipe Line Co.,* for example, the Court dismissed two appeals from the Supreme Court of Texas which were taken after that Court had refused applications for writs of error to the Court of Civil Appeals, an intermediate court. Holding, under 28 U.S.C., § 1257, that the appeals were properly from the Court of Civil Appeals, the Court quoted Mr. Justice Holmes' Opinion in *American Ry. Exp. Co.,* 263 U.S. at 20-21 as follows in pertinent part:

> * * * [U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary * * * and although it was necessary for the petitioner to invoke that jurisdiction in order to make

> it certain that the case could go no farther, * * * when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had.

As in the cited cases, the jurisdiction of the Court of Appeals of Maryland is discretionary. *See e.g. Walston v. Sun Cab Co.*, 267 Md. 559, 298 A.2d 391 (1973). Once that Court exercised its discretion by refusing to review this case on the ground that it was not "desirable and in the public interest", the judgment of the Court of Special Appeals became the final judgment "rendered by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257. Consequently, the Court of Appeals' Order denying Petitioner a writ of certiorari is not reviewable in this Court. The Petition should be denied since it only seeks review of that Order.

2. THE COURT SHOULD NOT REVIEW A MANDATE RESTING EXCLUSIVELY ON ADEQUATE AND INDEPENDENT STATE JURISDICTIONAL AND PROCEDURAL GROUNDS.

Even assuming that the Petition seeks review of the Court of Special Appeals' mandate, it is clear that the Court also lacks jurisdiction because the Court of Special Appeals' decision is based on adequate and independent state grounds. As this Court noted in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of State courts that rest on adequate and independent State grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be

> rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Here there can be no doubt that the Court of Special Appeals' Mandate is based entirely on State grounds.

The Opinion upon which the Court of Special Appeals' Mandate was based is attached to the Petition at Appendix pages A-2 through A-12. It is apparent, from a review of the Opinion, that the basis for the court's decision was that, under Maryland law, Petitioner's claims fell within the exclusive original jurisdiction of the PSC. Maryland law required that Petitioner exhaust the remedies available to him before the PSC before seeking redress in the courts. Quoting from a line of Maryland cases defining the jurisdiction of the PSC, the court noted at page 5 (Appendix, A-9):

> The appellate courts of this state have consistently enforced the clear legislative design to commit all controversies arising between public utilities and their customers over manner of operation, rates and service of the utility to the P.S.C. and have thwarted any attempt by customers to seek judicial redress without having first exhausted the administrative remedies provided by the legislature.

Contrary to what Petitioner implies, the court did not deprive him of redress—it simply held that his redress, under the Public Service Commission Law of Maryland, stood with the PSC, a body authorized to receive complaints, serve process, conduct hearings, and enforce its decisions. Only after this was accomplished could he turn, under Maryland law, to the courts for judicial review. In the course of so holding, the court did not once quote, cite or refer to Federal law. The decision was unquestionably and exclusively based on unchallenged Maryland case law interpreting the Public Service Commission Law of Maryland, a fact which Petitioner does not appear to dispute. Hence, the resulting mandate is not reviewable in this Court since it is supported by adequate and independent state grounds.

CONCLUSION

At most, the Petitioner seeks nothing more than review of a Maryland court's mandate interpreting and effectuating Maryland law. Since the decision below is based entirely on unchallenged State law requiring the exhaustion of administrative remedies, the Court is respectfully requested to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: June 1, 1987.